SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 245.

THE UNITED STATES OF AMERICA

vs.

OREGON LUMBER COMPANY, JOSEPH BARTON, FREDERICK H. ATKINSON, AND FRANK M. SHURTLIFF.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, v. OREGON LUMBER COMPANY, A CORPORATION; JOSEPH BARTON, Frederick H. Atkinson and Frank M. Shurtliff, defendants in error.	No. 3485.

Upon writ of error to the District Court of the United States for the District of Oregon.

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, certifying certain questions or propositions of law to the Supreme Court of the United States under section 239 of the Judicial Code.

Before GILBERT, MORROW, and HUNT, circuit judges:

This cause came to the Circuit Court of Appeals for the Ninth Circuit upon writ of error to the United States District Court for the District of Oregon upon a judgment in favor of the Oregon Lumber Company, a corporation, Joseph Barton, Frederick H. Atkinson and Frank M. Shurtliff, defendants in the District Court, and against the United States, plaintiff in that court. The
2 action was to recover damages for the value of certain lands.

The complaint filed in February, 1918, charged that during 1899 the Oregon Lumber Company, a corporation, and certain of its officers named as codefendants, unlawfully conspired to acquire certain tracts of land in Oregon under the timber and stone act of June 3, 1878 (20 St., chap. 151, 89); that in carrying out the conspiracy in 1900 the claims were patented to applicants for the lands, and that the applicants thereafter transferred the land to one Eccles, an officer of the defendant corporation, and thereafter (with the exception of a small tract) the lands so patented were transferred by Eccles to the defendant corporation. The value of the lands was alleged to be $65,000, for which sum judgment was asked.

The defendants denied all material allegations of the complaint and pleaded, among other things, as separate defense, (1) that pro tanto to the measure of damages the United States received from the several entrymen named in the complaint the aggregate sum of $16,400, which was the price fixed by law and the practices in the land office for the lands described in the complaint; (2) that in October, 1912, the United States brought suit in equity to set aside the patents for the lands and alleged that it owned the property described in the complaint herein and that the patents for the lands which are the same as are involved in this action were secured
3 through fraud of the defendants named in the present action and others, and prayed for the cancellation of the patents; that in the equity suit substantially the same facts were pleaded as are pleaded by the United States in this action; that issue was joined

in the equity suit; that in 1916, after trial upon the merits, the District Court dismissed the equity suit for the reason that the United States had had full knowledge of the matters complained of in its complaint for more than six years before the equity suit was instituted, and that no appeal was ever taken from the decree dismissing the complaint of the United States.

To these separate defenses the United States demurred. The District Court overruled the demurrer, and the United States declined to plead further. Thereupon the District Court dismissed the complaint and judgment was entered.

The District Court, rendering its judgment, decided that inasmuch as the suit in equity was brought by the United States with knowledge of all the facts, it constituted an election final and conclusive.

Questions of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires the instruction of the Supreme Court are:

1. Is an action by the United States for the value of lands as damages, against the patentees for the lands for fraudulent acquisition of the lands patented under the timber and stone act,
4 barred where more than six years have elapsed after the United States, with knowledge of the fraud, brought a suit in equity to cancel the patents for the same lands, in which equity suit decree of dismissal was made against the United States on the ground that the suit was barred by the statute of limitations?

2. If the foregoing question be answered in the negative, should any damages recoverable be reduced by such amounts as the United States may have received from the entrymen, as the price fixed by law for the lands described in the patents?

WM. B. GILBERT,
WM W. MORROW,
WILLIAM H. HUNT,
Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: San Francisco, California, February 28th, 1921.

(Endorsed:) Certificate, etc. Filed February 28, 1921, F. D. Monckton, clerk, by Paul P. O'Brien, deputy clerk.

A true copy: Attest, February 28, 1921.

[SEAL.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

5 (Indorsed:) No. 3485. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, plaintiff in error, vs. Oregon Lumber Company et al., defendants in error, certified copy of certificate.

(Stamped:) Office of the clerk Supreme Court, U. S. Received Mar. 7, 1921.

(Indorsed on cover:) File No. 28,141. U. S. Circuit Court of Appeals, 9th Circuit. Term No. 245. The United States of America vs. Oregon Lumber Company, Joseph Barton, Frederick H. Atkinson, and Frank M. Shurtliff. Certificate. Filed March 7th, 1921. File No. 28,141.